

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE

CASE NO. SC10-348

RE: JUDGE DALE C. COHEN, #09-524

JQC'S TRIAL MEMORANDUM

The Florida Judicial Qualifications Commission (JQC) by its undersigned counsel, submits this trial memorandum in the above-styled action.

MEMORANDUM

I. The JQC's Case Against Judge Cohen.

(a) *State of Florida v. Steven Gibbs*

On August 6, 2009, in *State of Florida v. Steven Gibbs*, Broward County Circuit Court, Mr. Gibbs, and his attorney, Steven Melnick, jointly filed a sworn motion to recuse Judge Cohen. A copy is attached as Exhibit A. The motion was facially sufficient, and Judge Cohen should have granted it without a hearing. Rule 2.330, Fla.R.Jud.Admin. (Exhibit B)

The legally sufficient allegations contained in the recusal motion were obviously harmful to Mardi Levey Cohen's candidacy. When she appeared

in his court room at the same time the matter was to be heard, rather than routinely grant the motion (as had been his practice up to this point), he promptly recessed court and immediately left with Ms. Cohen. Upon returning, Judge Cohen not only failed immediately to grant the legally sufficient motion; he proceeded to call his wife as a witness in an official court hearing on the motion to recuse, personally to interrogate his wife over Mr. Melnick's objection, and then to put Mr. Melnick in the position of having to cross-examine and attack the credibility of Judge Cohen's wife, with Judge Cohen sitting as the judge.

When word of this bizarre procedure became public, the JQC served a notice of investigation on Judge Cohen, and on November 6, 2009, Judge Cohen appeared before the Investigative Panel of the JQC and voluntarily offered sworn testimony to explain his conduct in Gibbs.

According to his sworn testimony, the purpose of the hearing on the motion to recuse was to benefit Judge Cohen's wife:

Judge Cohen: The allegations in his motion to recuse I didn't think were - - well, they weren't accurate or they were exaggerated, and I thought, well, if he heard my wife, he would realize what he was writing wasn't true and we would get past

it, he wouldn't file them any more and this would clear it up.

(TR p.9 l. 1.23- p. 10, l.5).

Judge Cohen: I just – I just wanted to get it out into the open.

I wanted him to hear my wife's side. I wanted my wife to hear

his side. And I just wanted to clear it up. (TR p.18, l. 12-15).

Judge Cohen thus admits he was using his judicial power to benefit his wife, a candidate for judicial office.

At the November 6, 2009, hearing, Judge Cohen did not testify that he was investigating purported misbehavior or wrongdoing on the part of Mr. Melnick. On the contrary, he painted, under oath, the following sanguine picture of his long-term, friendly relationship with Mr. Melnick:

Judge Cohen: I could pretty honestly say I was friends with almost everybody in the criminal system, including Steve Melnick" (TR p.6, l.22-24).

* * *

Judge Cohen: I have no animosity with Steve Melnick whatsoever I would say "Don't worry about it. It's fine. There is no animosity at all." (TR p.7, l.16-22).

* * *

Judge Cohen: I was friends with Steve Melnick before. No animosity. (p. 9, l. 22-23).

* * *

Judge Cohen: In any event, once I found out he [Melnick] was upset I called Melnick's office. I apologized. I told him the *only reason* that I had a hearing was to clear up our friendship. We've been friends 20 years. And I just think things got out of control. I apologized. And I agreed to blanketly agree [sic] to recuse myself on all of his cases in the future. [emphasis added] (TR p.10, l. 23-25; p.11, l. 1-5).

* * *

Judge Cohen: My purpose of the hearing was not to embarrass him, it wasn't to create a hostile court environment. He was my friend. I considered him a friend. I wanted to maintain a friendship. (TR p.17, l. 13-17).

* * *

Judge Cohen: On page 15, line 9, I told him, "You've been a friend for 22 years. That's why I held the hearing." [Judge Cohen was referring to the transcript of the hearing on the

recusal motion in *State v. Gibbs*.] (TR p. 18, l. 25; p. 19, l. 1-3).

Having thus painted, under oath, this picture of two friends of long-standing merely having a minor misunderstanding, Judge Cohen made the following admissions to the JQC Investigative Panel:

Panel Question: [W]hy would you use a court room do that, in your robe, sitting up there as a judge? That's the question.

Judge Cohen. I was wrong. (p.33, l.5-9).

* * *

Panel Question: Couldn't a person looking at this say or conclude that you conducted the hearing in order to intimidate him? [Melnick]

Judge Cohen: Someone could, but I am telling you ...

Panel Question: And your responsibility as a judge is not to put yourself or the judiciary in that position?

Judge Cohen: Yes.

Panel Question: Why was your wife at this hearing?

Judge Cohen: I asked her to be there.

Panel Question: So you provided for a witness to attend an evidentiary hearing that you were going to conduct?

Judge Cohen: [Moving head up and down]

Panel Question: I can't hear you.

Judge Cohen: Yes. Yes.

Panel Question: She was not under subpoena?

Judge Cohen: No. (TR p. 34, l. 23-25; p. 35, l. 1-20).

Judge Cohen made the following admissions that he violated specific provisions of the Code of Judicial Conduct.

Panel Question: As we sit here today, do you agree that you violated Canons 3, 3(b), the provisions that we went through:

Judge Cohen: Yes. (p.40, l. 18-21).

* * *

Panel Question: Canon 2(a), "A judge shall respect and comply with the law and shall act at all times in the manner that promotes public confidence [in] the integrity and impartiality of the judiciary." Are you familiar with that provision?

Judge Cohen: I am since - - Yes. I - -

Panel Question: Do you believe that your conduct is in violation of Canon 2(a).

Judge Cohen: Yes. (p. 40, l. 22-25; p. 41, l. 1-6).

* * *

Panel Question: Canon 2(b), which I don't believe was on the notice of investigation, but I do think it's pertinent, "A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment." Do you think that someone could look at your conduct and say, "Sounds like there's a problem with 2(b) as well."?

Judge Cohen: You know, I just - - I'm going to say yes. (p.41, l. 7-15).

* * *

Panel Question: How many times in your career have you had an ex parte conversation with witnesses that are going to appear before you and give testimony under oath?

Judge Cohen: Never.

Panel Question: That's wrong, isn't it?

Judge Cohen: It is wrong. I didn't talk about the subject matter of her testimony, I just said, "can you be here? He filed this motion."

Panel Question: So it makes it OK?

Judge Cohen. Nothing I did was OK. (TR p. 66, l. 20-25; p. 67, l. 1-6).

* * *

Judge Cohen: And I agree with [Panel member] that I did violate Canons for reasons that I did not think of prior to coming to this hearing.

I'm - - I know I'm wrong. I shouldn't have done it. The whole thing smells really bad. I really didn't have the intent to humiliate anybody or embarrass him, I just had good intentions. And, you know, it blew up on me and here I am, the last place I want to be today. (p. 69, l. 24-25; p. 70, l.2-8).

(b) *State of Florida v. Leon Butler*

After November 6, 2009, the date of Judge Cohen's first appearance before the Investigative Panel, the JQC served a second notice of investigation to inquire into Judge Cohen's conduct in *State of Florida v. Leon Butler*. On August 28, 2009, 22 days after the recusal hearing in Gibbs, in which Judge Cohen called his wife as a witness, Judge Cohen held another evidentiary hearing on a recusal motion filed jointly by the defendant Leon Butler and his attorney, Steve Melnick. (Exhibit C) Butler's motion to recuse was sworn to by both Mr. Butler and Mr. Melnick. The Butler motion to recuse contained the same allegations as did the Gibbs motion to recuse, but included additional allegations about the recusal

hearing that involved Judge Cohen's wife on August 6, 2009. These additional allegations were that Judge Cohen questioned the truthfulness and veracity of earlier recusal motions of Mr. Melnick; that Judge Cohen conducted a hearing in which he called his wife as a witness to challenge the credibility of Mr. Melnick; and that the hearing was conducted in an effort to embarrass and intimidate Mr. Melnick.

The Butler recusal motion was legally sufficient on its face, and Judge Cohen should have immediately granted it. Instead, he swore in Mr. Butler and began to question him about conversations he had had with his attorney, Mr. Melnick. Mr. Melnick objected, asserting an attorney/client privilege, but Judge Cohen overruled Mr. Melnick's continuous objections that Judge Cohen's questions invaded the attorney/client privilege, and Judge Cohen ordered Mr. Butler to answer the questions. During the hearing, Judge Cohen threatened Mr. Melnick with a Florida Bar complaint for "forum shopping."

Because of an equipment malfunction, the court reporter was unable to produce the transcript of the recusal hearing in *State v. Butler*, but Judge Cohen has submitted an affidavit of assistant state attorney, Florence Taylor Barner, that reflects the substance of the *State v. Butler* recusal hearing. A copy of that affidavit is attached as Exhibit D.

In lieu of appearing personally before the Investigative Panel to explain the Butler incident, Judge Cohen submitted a written response in which, contrary to his sworn testimony at the November 6, 2009, hearing, Judge Cohen launched a serious personal attack on Mr. Melnick. In a matter of a few weeks, Mr. Melnick was no longer Judge Cohen's friend. Instead, Judge Cohen stated that he doubted Mr. Melnick's ethics; that Mr. Melnick's reputation was for being "less than ethical" in the handling of his cases; that Mr. Melnick dresses inappropriately and is very lax in his approach to the court and shows a general disdain for the authority of the court; and that Mr. Melnick's clients appear in court without him. This response leads one to conclude that Judge Cohen's sworn testimony to the Investigative Panel on November 6, 2009, was less than candid.

(c) *State of Florida v. Steven Gibbs (redux)*

On October 22, 2009, about two weeks before Judge Cohen's initial appearance before the Investigative Panel on November 6, 2009, Steven Gibbs came before Judge Cohen for sentencing. Mr. Gibbs appeared before Judge Cohen because Mr. Melnick was no longer his attorney, and Mr. Gibbs' new counsel made no effort to recuse Judge Cohen. Judge Cohen again invaded the attorney/client privilege by demanding to know what Mr. Melnick told Mr. Gibbs, and asked other questions of Mr. Gibbs that

invaded the attorney/client privilege. A copy of the transcript of the second Gibbs hearing is attached as Exhibit E.

The purpose of Judge Cohen's questioning of Mr. Gibbs at the sentencing hearing was to develop information that Judge Cohen could use against Mr. Melnick for the benefit of Judge Cohen and his wife.

(d) The photographs of Mr. Melnick.

On January 12, 2010, Judge Cohen's wife, who was then running for judicial office under the name Mardi Ann Levey Cohen, was observed by a court deputy and the court clerk in Judge Jeffrey Levenson's courtroom clandestinely photographing Mr. Melnick, (who was making an appearance for a client), and when confronted about it, Mardi Cohen left the courtroom. Judge Cohen submitted those photographs of Mr. Melnick to the Investigative Panel of the Commission. This was a continuation of Judge Cohen's efforts to embarrass and intimidate Mr. Melnick and to advance his personal interests and those of his wife.

II. Argument

During his appearance before the Investigative Panel on November 6, 2009, Judge Cohen admitted that he violated the provisions of Canon 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of

the judiciary"), and he also admitted that his conduct violated Canon 2(B) ("A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; ..."). Judge Cohen admitted to the Investigative Panel that he violated the provisions of Canon 3(B)(2) ("A judge shall be faithful to the law and maintain professional competence in it"). Judge Cohen admitted that he violated Canon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.").

The evidence establishes that Judge Cohen also clearly violated Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. Provisions of this Code should be construed and applied to further that objective.")

Finally, in refusing to disqualify himself immediately, and instead holding evidentiary hearings on the recusal motions, Judge Cohen violated Canon 3(E)(1)(d) ("A judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned, including . . .

where: . . . (d) the judge or the judge's spouse, . . . : (i) is a party to the proceeding, . . . (iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding;")

III. Conclusion

Judge Cohen has admitted violating Canons 2A, 2B, 3B(1) and 3B(2), and the evidence is clear that he has similarly violated Canons 1, 3B(7) and 3E(1)(d) and the Hearing Panel should so find. So it is for the Hearing Panel to determine whether this behavior coupled with Judge Cohen's lack of candor in responding to the charges demonstrates a present unfitness to hold office, or whether the conduct warrants other discipline. What is clear is that his conduct was fundamentally inconsistent with the responsibilities of his judicial office.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to: Michael A. Catalano, Esq., Michael A. Catalano, P.A., 1531 N.W. 13th Court, Miami, FL 33125; Laurie Waldman Ross, Esq., Ross and Girten, 9130 S. Dadeland Blvd., Suite 1612, Miami, FL 33156; and Henry M. Coxe, III, Esq., Chairman, JQC Hearing Panel, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., 101 East

Adams Street, Jacksonville, FL 32202-3303 this ____ day of January, 2011.

F. WALLACE POPE, JR.
FBN #: 124449
JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP
P.O. Box 1368
Clearwater, FL 33757
727-461-1818
727-462-0365 – fax
Special Counsel for Florida
Judicial Qualifications Commission

and

JUDICIAL QUALIFICATIONS
COMMISSION

By: Michael L. Schneider
General Counsel
Florida Bar No. 525049
1110 Thomasville Road
Tallahassee, FL 32303
(850) 488-1581

548178